No. 12937

United States
COURT OF APPEALS
for the Ninth Circuit

MARYLAND CASUALTY COMPANY, a corporation,
Appellant,

vs.

SIDNEY F. PATON and LOIS ELEANOR PATON,
Doing Business as PARAMOUNT SERVICE,
Appellees.

APPELLANT'S REPLY BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

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INTRODUCTION

From a study of the briefs the following facts and legal propositions appear undisputed:

1. AGREED FACTS:

There is no dispute in this case as to the facts or the inferences to be drawn therefrom. Simply stated, it is agreed that James Buie was hired in California, was

subject to the California Workman's Compensation Act and was killed in Oregon by what must be assumed to be the negligent and wrongful act of the Appellees. The Appellant under the California Compensation Act became obligated to pay $6300.00 to Buie's widow because of his death.

2. AGREED LEGAL PRINCIPLES:

(a) Appellant concedes that it cannot rely on being subrogated to any action that Buie, his widow or personal representatives may have had under the Oregon wrongful death act, as any such action is barred by the statute of limitations.

(b) Appellees concede that if Buie had been killed in California the law of California would give the Appellant an enforceable statutory cause of action based upon the admitted facts (Appellees' Brief, pages 3 and 4).

3. DISPUTED LEGAL QUESTIONS:

(a) Do the admitted facts support the application of the common law right of implied indemnity?

(b) Does the fact that this accident occurred in Oregon prevent the creation, in Appellant's favor, of a cause of action based on the California law?

THE ARGUMENTS UPON THE CALIFORNIA LABOR CODE

1. Appellee's Argument, pp. 3, 4, Appellees' Brief: If the accident had occurred in California, Appellees

concede Appellant would have a cause of action. But Appellees contend that it would be giving extraterritorial application to the California law to permit the enforcement of the employer's cause of action against a tortfeasor whose wrong occurred in Oregon.

REPLY: As Appellant's initial brief strove to elucidate, the California law creates in the employer or insurer an independent cause of action for recovery of compensation paid on account of the tortious injury or death of the employee. The California law operates, as Appellees concede (p. 6, Appellees' Brief), upon accidents occurring outside the State. Given these postulates, it seems to accord with logic and justice to say that an accident in Oregon which resulted in a liability in California created a cause of action *in California,* to which the Appellees should respond wherever service can be obtained.

The argument of "extraterritoriality" is specious. California's statute operates extraterritorially *as against the employer or insurer,* but this is obviously no concern of the tortfeasor. This extraterritorial operation creates a cause of action, in California, against the tortfeasor. To enforce that cause of action elsewhere is a perfectly normal concomitant of the federal system of government. Probably the majority of causes of action, including statutory private liabilities, can be prosecuted wherever process exists.

2. Appellees' Argument, pp. 4, 5, Appellees' Brief: Appellees cite the case of *Personius vs. Asbury Trans-*

portation Company, 152 Ore. 286, 53 P. (2d) 1065 (1936).

REPLY: All that need be said of this case is that it concerned a statute fundamentally unlike the California Labor Code, with respect to the employer's right over against the tortfeasor. The Idaho statute involved in the *Personius* case *subrogated* the employer to the employee's cause of action. The cardinal feature of the California statute is the investment of the employer or insurer with a new, original cause of action.

The one feature of this case which seems to console Appellees is the statement: "The prohibition imposed on the Idaho courts has no extraterritorial effect on the courts of this state." *This has no bearing on our case whatever.* The question in the Personius case was whether an employer, to whom the Idaho compensation act ostensibly *assigned* the employee's cause of action against the tortfeasor, was the only one who could enforce a cause of action arising out of an Oregon injury. As is pointed out in the quotation from the opinion a workman is not so precluded from maintaining an action under Idaho law. In our case, the question is not one of "parties" but the enforcement of an entirely separate cause of action.

3. Appellees' Argument, pp. 6, 7, Appellees' Brief: Appellees seek to dispel the clear implications of the cases of *Sloan v. Appalachian Electric Power Co.,* 27 F. Supp. 108 and *Biddy vs. Blue Bird Air Service,* 374 Ill. 506, 30 N.E. (2d) 14 (1940).

REPLY: These two cases were introduced by Appellant to show that where an employee, subject to the Compensation Act of state A, is injured in state B, and an action is commenced in state B, the court will recognize the substitution of the employer or insurer effected by the compensation laws of state A. This is far more "extraterritorial" than anything we are invoking in this case, because while the Sloan and Biddy cases involved mere subrogation, this case is one where the Appellant has its own independent cause of action. Appellant, that is, is not asserting that a California statute affected an Oregon cause of action as was true in the Sloan and Biddy cases.

THE ARGUMENTS UPON INDEMNITY

1. Appellees' Argument, pp. 8, 9, Appellees' Brief: Appellees challenge the importance of *Travelers Insurance Co. vs. Great Lakes Engineering Works Co.*, 6 Cir., 184 Fed. 426, by an exaggeration of a single feature of that case. In that case, the engineering company installed a defective boiler for the brewing company; the boiler exploded, killing one brewery worker and injuring another. The brewery company's insurer paid compensation and sued the engineering company. Appellees claim that this case is "entirely different from our present case" because there was a contractual relationship between the engineering company and the brewing company, where there was no such relation between the parties herein.

REPLY: As Appellant noted in its brief, the existence of a contract between the engineering company and the brewing company did *facilitate* the finding that the engineering company owed a duty to the brewing company not to expose the brewing company to compensation liability by injuring the brewery workers. But is it not obvious that this duty is itself a manifestation of the indemnity principle? Furthermore, the Travelers case is undeniably one of the great precursors of the modern development of the doctrine of implied indemnity. It molded the earlier laws of "subrogation" into the modern law of indemnity.

As Appellant's initial brief more fully explains, the *Travelers* case is of great importance to this case, and regardless of the existence of a contract between the brewery and the engineering company, it found an *implied* duty, flowing to the employer, not to inflict liability upon the employer for compensation. It is obvious—in fact it is one of the main elements of the decision—that the employer's cause of action is independent of the employee's cause of action. It is equally obvious that the employer's cause of action springs from the imposition of a form of compensation liability. And, finally, the employer's action bears no relation to the wrongful death statute in the event the employee is fatally injured.

Assimilating these salient points to our case, no one can soberly claim that the *Travelers* case is a mere museum piece resting on "entirely different" considerations.

2. Appellees' Argument, p. 10, Appellees' Brief: Appellees say: "In the instant case, there can be no contention that any relationship existed between Pacific Quaker Rubber Co. (sic), the employer of the deceased, and the Appellees and there consequently could be no breach of any duty because in fact no duty existed between Appellees and Pacific Quaker Rubber Co."

REPLY: While this announcement may be regarded simply as begging the question, it may be added that the chief effect of the doctrine of indemnity *is to create a duty* between persons in the roles of Appellees and Appellant here. There could be and was a breach of a positive duty not to cause Quaker Pacific Rubber Company (or its insurer) liability to its employees, and the breach of this duty is the very one which may be redressed by the action for indemnity.

In *Oceanic Steam Navigation Co. vs. Compania Transatlantica Espanola,* 134 N.Y. 461, 31 N.E. 987 (1892), a lessee was sued for injuries caused by the negligence of a sublessee. The lessee sued the sublessee for indemnity. The Court said:

> "Sufficient cases have been cited to show that one who has been held legally liable for the personal neglect of another is entitled to indemnity from the latter, no matter whether contractual relations existed between them or not, and that the right to indemnity does not depend upon the fact that the defendant owed the plaintiff a special or particular legal duty not to be negligent. The right to indemnity stands upon the principle that every one is responsible for the consequences of his own negligence, and, if another person has been compelled

(by the judgment of a court having jurisdiction) to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him." 31 N.E. 987, 989.

3. Appellees' Argument, p. 11, Appellees' Brief: Appellees disparage the case of *Staples, et al. vs. Central Surety and Insurance Co.,* 10 Cir., 62 Fed. (2d) 650 (1932).

REPLY: In their rather categorical depreciation of the *Staples* case, Appellees implicitly admit that it is highly pertinent to this matter, though they question the propriety of the decision. Appellees are, we believe, demonstrably wrong in feeling that the *Staples* case misapprehended the precedents which it quoted. By the time of the *Staples* case (1932), the principle of implied indemnity was firmly settled. The *Staples* case merely utilized it in a modern workmen's compensation situation.

4. Appellees' Argument, pp. 11-16, Appellees' Brief: The *Crab Orchard Improvement Co.* case is patently the keystone of Appellees' legal argument against indemnity.

COMMENT: The *Crab Orchard* case seems to repose mainly upon the authority of the Restatement of the Law of Restitution, sec. 76, in its rejection of the doctrine of indemnity. With respect to court decisions, the *Crab Orchard* case refers to the *Staples* case and to the old case of *Travelers v. Great Lakes Engineering Works* and, recognizing that they represent the princi-

ple for which we contend, simply refused to adopt their precept. The Court also attempted to distinguish several other cases cited by Appellant in its brief. Appellant leaves it to this forum to choose between the policies represented by the *Crab Orchard* case, on the one hand, and the *Staples* case on the other, for they are squarely in conflict.

The Restatement of Restitution, sec. 76, is apparently the mainstay of the *Crab Orchard* case. The opinion states that for a right to indemnity to arise,

> "Not only must a *benefit* be conferred upon the defendant by a discharge of his duty or obligation, but the discharge must have occurred under circumstances in which the plaintiff was, at the same time, discharging a personal obligation *coextensive* with that of the defendant." (Italics added)

The opinion then continued, with reference to the present sort of circumstances,

> " . . . the third party tort-feasor receives no benefit by the employer's payment under the Act. Furthermore, as the duty and obligation of the employer are different and distinct from the duty and obligation of the third party tort-feasor, the requisites for the application of the indemnity principles are not met."

As a preliminary comment, it must be observed that Restatement of Restitution, sec. 76, is obviously ill adapted to questions of indemnity growing out of torts. It seems to have been regarded by its authors as pertinent to contractual matters. Restatement of Restitution, sec. 86, is more nearly related to delictual situa-

tions, but has not been extensively interpreted. It may well be that the Restatement of Restitution does not cover a compensation question like this one.

However, to meet the Appellees on their own ground, as a precaution, we turn to the elements of "benefit to the tort-feasor" and "coextensive obligation", which the *Crab Orchard* case emphasized. Several opposing cases show that these two elements either exist in cases like this, or are not actually required—it is immaterial which.

Under the Federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., sec 905 ff, an employer is not liable in damages to his employees, but the employees can sue third parties for their injuries. In a group of recent cases under that Act, the workman has recovered from a third party; and the third party has in turn sued the employer (who was the active wrongdoer) and recovered on the ground of indemnity. *United States vs. Arrow Stevedoring Co.,* 9th Cir., 175 F. (2d) 329 (1949); *United States vs. Rothchild,* 9th Cir., 183 F. (2d) 181 (1950); *Rich vs. United States,* 2d Cir., 177 F. (2d) 688 (1949). A very similar example under a State law is *Westchester Lighting Co. vs. Westchester County Small Estates Corp.,* 278 N.Y. 175, 15 N.E. (2d) 567 (1938). In *Ruby Lumber Co., et al. vs. Johnson,* 299 Ky. 811, 187 S.W. (2d) 449 (1945), the law of Kentucky forbade an injured workman from suing either his employer (a subcontractor) or the general contractor. The workman recovered compensation from his employer, and his employer sued the general contractor on the ground that the general contractor's ac-

tive negligence had caused the injury, and therefore a right of indemnity existed. The general contractor defended on the same grounds suggested by Appellees here: that since the employee could not sue the defendant directly, then the employee's employer cannot do so either. The Court held that an independent right of indemnity existed, which bore no relation to the employee's claim.

While in these cases a contract of some sort existed between the employer and the third party, this is not a controlling factor. *Oceanic Steam Navigation Co. vs. Compania Transatlantica Espanola,* supra. In these cases, since the employer or defendant cannot be held liable directly to the employee, how can the third party's payment of compensation to the employee be deemed a "benefit" to the employer? If the employer or defendant is not liable to the employee for damages, how can it be said that the liability of the employer and the third party are "coextensive"? Yet indemnity is allowed.

Moreover, of course, indemnity was allowed in the *Staples, Travelers vs. Great Lakes Engineering Works Co.,* and other cases cited in Appellant's brief, and in the *Northwest Airlines* case, infra. In all of these cases the elements of "benefit" and "coextensive obligation" would doubtless be pronounced lacking by the Appellees —yet indemnity was allowed.

5. Appellees' Argument, p. 15, Appellees' Brief: Appellees make the point that the *Crab Orchard* case was decided in 1940, "whereas the *Staples* case was decided

in 1922". The *Staples* case was decided on the 21st day of December, *1932.*

Moreover, the *Staples* case, while it was not followed in 1940 by the *Crab Orchard* case, was followed at the end of 1950 in *Travelers Insurance Co. vs. Northwest Air Lines,* 94 F. Supp. 620, which is, on its facts closer to our case than any other that can be found.

6. Appellees' Argument, p. 17, Appellees' Brief: Appellees discuss the case of *Standard Oil Co. of Cal. vs. U. S.,* 9th Cir., 153 Fed. (2d) 958. It recites a portion of the opinion in this Court wherein the *Crab Orchard* case is mentioned.

REPLY: We believe that Appellees have misconstrued the utterances of this Court. The *Standard Oil* case was one in which the Government tested various theories in an effort to obtain reimbursement from the Standard Oil Co. for the latter's injury of a soldier. It appeared that the soldier gave, for a consideration, a release to the Standard Oil Co. for his damages. The Circuit Court said:

> "Therefore, Etzel's *release* to the defendants, which extended 'to all claims of every nature and kind whatsoever', covered his lost wages and medical expenses as elements of damage. These are the amounts which the United States here seeks to recover. Thus even if we may assume that the United States may be subrogated, without statutory authority, to the soldier's claims, it cannot be subrogated to such claims here because defendants have already paid Etzel for these losses. For the same reason the government would have no rights of in-

demnification, even under the broad rule of Restatement of Restitution, Section 76." 153 Fed. (2d) 958, 963. (Italics added)

It is obvious that the reference to the *Crab Orchard* case was mere dicta, the Court having already dispensed with the indemnity arguments on other grounds.

Nor is there any merit to Appellees' claim that this Court was speaking of an action for indemnity when it said that the courts should not "enlarge the scope of an ancient common law cause of action". The court was obviously referring to the Government's principal theory, which was that the Government has a right, corresponding somewhat to the very ancient right of a master to sue for the loss of his servant's services, or of a father to sue for torts to his children. This was the "ancient common law cause of action" which the Circuit Court refused to apply in the case of a soldier. And it is important to observe that the Circuit Court found basic differences between the relation of soldier and sovereign on the one hand, and civilian relations such as master-servant on the other. The Supreme Court, on appeal, ignored any question of indemnity.

Since the Supreme Court, in the appeal of the *Standard Oil* case, was speaking exclusively on the analogy of a soldier-government relation to the ancient family or servant status, the remarks by Justice Rutledge quoted by Appellees are not germane here.

And finally, the *Standard Oil* case as construed by the Supreme Court presented exclusively a federal issue.

7. Appellees' Argument, pp. 18, 19, Appellees' Brief: Concerning *Travelers Insurance Company vs. Northwest Air Lines, Inc.*

REPLY: Aside from the mention of some immaterial differences which probably do not exist, the Appellees simply disagree with this case, which, in view of its close support of Appellant's position on almost identical facts, is Appellees' only resort.

However, Appellees attack the *Northwest Air Lines* case on grounds of principle. Their first argument is that "Neither plaintiff was 'exposed to liability' by the wrongful act of the defendant. No action could have been brought against the plaintiff on account of the wrongful act of the defendant. The liability of the plaintiffs was created by the contract of insurance they made with the respective employers and that liability existed whether the defendants were negligent or not."

This is an unrealistic statement, to say the least. In both cases (ours and the Northwest Air Lines case) the insurer was "exposed to liability" in that binding orders of a competent tribunal were issued to compel them to pay several thousand dollars. This order in our case was made directly to Appellant. It was on account of the wrongful act of the defendant. To say that the insurer's liability to pay compensation is attributable solely to a contract of insurance, and not to the tort, is only partly true—the omitted element is the fact that someone other than the active wrongdoer had paid for the tort, and upon this element the doctrine of in-

demnity operates. It must be remembered that indemnity has the aspect of an equitable remedy.

The liability of the employer's insurer to the *employee* is unconditional in the case of a covered injury, whether that injury is caused by the tort of a third person or not. As against the tortious third person, however, the law of indemnity recognizes that, whether the insurer must pay in all cases or not, in *this* case payment was necessitated by a wrong, the consequences of which should ultimately rest on the wrongdoer. There is nothing unusual about this: it is the standard pattern of the right to tort damages.

Appellees' second argument is that "Neither plaintiff had to pay damages as a result of the death * * *."

It is difficult to see what this argument tends to prove. Plaintiffs suffered loss because of the tortious injury of the employees. Plaintiffs sue to recoup this loss. There is no possible ground for requiring that the loss qualify as one incurred because of a wrongful death statute, as Appellees seem to argue. Perhaps Appellees feel that a tortfeasor is entitled to gauge the extent of his liability, in advance of his tort. The law has never made tort liability the subject of easy preliminary calculation. A tortfeasor opens Pandora's box without previous inspection.

8. Appellees' Argument, p. 19, Appellees' Brief: Concerning Restatement of the Law of Restitution, sec. 76, Appellees say that this section "contains a more accurate and specific definition of indemnity than that

of other texts."

REPLY: Appellant has already discussed this section of the Restatement of Restitution. We pause here only to deny that this section contains an adequate definition of indemnity as that subject is recognized by the Courts.

9. Appellees' Argument, p. 20, Appellees' Brief: Appellees call the Court's attention to a "very recent work, 'Subrogation Under Workmen's Compensation Acts'" by William B. Wright. Appellees make an argument based on a negative inference when they say: "At no place in the work does he refer to a cause of action based upon indemnity as the appellant is contending for here."

REPLY: The failure of a text writer to mention some rather prominent features of his chosen subject is hardly a basis for considering that that feature does not exist. If Mr. Wright ignored indemnity in his work, his judgment was faulty; and if he missed finding the law of indemnity, then he did not pursue his researches far enough to qualify him as an authority. In any event, his failure to mention indemnity, which is a likely answer to this case, eliminates him as a source of well-rounded information in this matter. Since he did not mention indemnity, which the *Travelers vs. Great Lakes* case, the *Staples* case and the *Northwest Air Lines* case all held was supplemental to the employee's cause of action, and distinct therefrom, no useful purpose is served in replying to the excerpts quoted from his work.

10. Appellees' Argument, p. 23, Appellees' Brief: Appellees, in their conclusion, quoting from Goodrich, "Conflict of Laws" state that "the law of the place where the tort is committed governs as to whether there will be a recovery, and the extent of the recovery, if any."

REPLY: This statement of law (with which we do not quarrel) must be related to Appellant's theory of its case. Appellant should prevail upon either a cause of action for property damage, created by the California Labor Code, or a cause of action for indemnity. The cause of action created by the California Labor Code is governed by the law of California. The cause of action for indemnity is doubtless of California origin, and it is not distinctively a tort claim, anyhow. In short, the excerpt from Goodrich has not much bearing on this case, since Appellees make the citation with reference to Oregon law. Goodrich is talking about tort liability and not indemnity liability.

11. Appellees' Argument, pp. 23, 24, Appellees' Brief: Appellees cite Goodrich, op. cit., sec. 102; and several sections from American Jurisprudence to the effect that no action can be brought for wrongful death except in conformity with the wrongful death statute of the state in which the fatal injury occurred.

REPLY: As Appellant has emphasized, this action is in no sense one for wrongful death. We repeat it here to dispel the references just mentioned.

12. Appellees' Argument, p. 25, Appellees' Brief: Appellees argue that they should be exonerated here because Oregon law does not designate persons in Appellant's position as entitled to protection from the vehicular torts of the Appellees; for which Appellees cite Harper on Torts, sec. 73, for the rule that a tortfeasor is liable only to those within the class imperiled by his negligence.

REPLY: Appellees inflicted damage upon Appellant by striking an employee covered by Appellant's policy of compensation insurance, whether that injury arose from the California Labor Code or the law of indemnity. Appellees' argument is that this injury was not within the scope of the harm threatened by Appellees' negligent driving, and hence Appellees should be exculpated under the doctrine of *Palsgraf v. L. I. R. Co.,* 248 N.Y. 339, 162 N.E. 99.

The doctrine of the *Palsgraf* case pertains to the actual incidents of a negligent accident, and contemplates such matters as what persons were within the range of harm, and what sort of damage could be apprehended. With respect to the *financial* consequences of a tort, the *Palsgraf* case is silent. This action is one for reimbursement of damages, and, if the *Palsgraf* case were seriously considered to apply here, it should be said that one can always anticipate paying damages when he is negligent. At any rate, the *Palsgraf* case has had no apparent effect in cases of this sort.

13. Appellees' Argument, p. 25, Appellees' Brief: Appellees express concern at the "chaos" which they claim will flow from the enforcement in Oregon of a California cause of action which is stimulated by an Oregon tort.

REPLY: Under either theory which Appellant advances here, double recovery by Appellant and anyone else is impossible. This is provided by the Labor Code in the case of the statutory cause of action, and by the courts in the case of the common law action for indemnity. The "chaos" of which Appellees speak, then, is the consternation of a tortfeasor required to discharge his debt.

For obvious Constitutional reasons, such as the requirements of due process, and for equally manifest practical reasons, no state can create a cause of action unless something has occurred which has a significant, substantial and actual effect within that state. Nor can a state offer a remedy where there is no wrong. Nor can a state create rights in a vacuum. Appellees' fears are mere phantasms so long as the Constitution requires the safeguards just mentioned.

Appellant submits that there was ample repercussion in California from the Oregon tort to justify, and validate, the creation of a cause of action against Appellees. Nor has the Legislature of California attempted to "set aside the only statute of Oregon, giving a cause of action in the event of wrongful death". The Legislature of California has nothing to do with the Oregon wrongful death act. It merely provided that in this particular

sort of case the Appellant has been remediably injured by the Appellees. It would be as disturbing as any frights the Appellees have professed if the Oregon Legislature, by enacting statutes, could bar litigants from acquiring in other states causes of action for the results, outside Oregon, of acts done within Oregon.

14. Appellees' Argument, p. 27, Appellees' Brief: Appellees cite the statement of Rutledge, J. in the *Standard Oil* case regarding the creation of a new cause of action.

REPLY: As we have explained above, this fragmentary utterance relates to something entirely foreign to the issues of this case. The creative touch has already been applied by the Supreme Court in the cases of indemnity, and liberally at that. The California Legislature has acted to establish a liability, too.

Respectfully submitted,

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